Supreme Court, U.S.
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No. 94-1601

In The

Supreme Court of the United States

October Term, 1994

THE VILLAGE OF SEBRING,

Petitioner,

vs.

MARK E. WAYNE; CARLA L. WAYNE; ROLAND L. KENDRICK; BRET E. SMITH; BRENDA S. SMITH; ROBERT J. ROUSE, JR.; SHARON ROUSE; DONALD G. STILLION; BEVERLY J. STILLION; WILLIAM H. TUEL; MARJORIE R. TUEL; CLAUDE J. BAILEY; MARGARET J. BAILEY; LARRY L. HARTLEY; KATHLEEN J. HARTLEY; JUDY K. COSTELLO; NANCY STUCHELL; AND JEFFREY STUCHELL,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVE J. EDWARDS
4030 Broadway
Grove City, Ohio
43123-3026
(614) 875-6661
Counsel of Record

KAREN D. KENDRICK-HANDS
1067 Devonshire Road
Grosse Pointe Park, MI 48230
(313) 885-7588

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondents Mark E. Wayne, et al., oppose the Village of Sebring's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Respondents adopt the facts as found by the Honorable David Dowd, N. D. Ohio and affirmed by the Sixth Circuit (rehearing and rehearing en banc denied). As the dispute evolved, the facts have become ever more complex due to a series of evasive maneuvers taken by Sebring in bad faith to damage the extraterritorial water customers. Petitioner's disjointed retelling contains several factual inaccuracies which will be corrected in the Argument below.

This litigation involves both a simple story and a complex story, the two of which intertwine. The dispute shaping the simple story arises from Sebring's attempt to compel extraterritorial customers of its water system to annex, as a condition of *continuing* water and sewer service, within federally funded service areas, in violation of federal law. Because the ground water in the area is poor or nonexistent and because of the ban on alternate water suppliers under 7 U.S.C. §1926(b), petitioner's actions will leave respondents without water. The respondents own parcels which have been connected to either the village water[1] or sewer system[2] or both[3] for as long as eighty years. Respondents sued to

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[1] Mark and Carla Wayne, Bret and Brenda Smith, Jeffrey and Nancy Stuchell, Roland Kendrick, Claude and Margaret Bailey, Larry Hartley, Don and Beverly Stillion and William and Marjorie Tuel. Kathleen Hartley died during the litigation.

[2] Robert and Sharon Rouse

[3] Judy K. Costello

enforce their rights to continue existing services from petitioner.

Respondents Wayne, Kendrick, Tuel, and Bailey receive their water through pipes laid by the Maple Ridge Water Association [MRWA].[4] Taps were extended to non-resident users in the area under a 1952 agreement between MRWA and petitioner which did not require annexation.

Other parcels outside of the village limits, and not within the now defunct MRWA, have applied for and been granted water service, including those owned by respondents Costello, Smith, Stuchell, Stillion, and Hartley. Costello and the Rouses also receive sewer service.

Every extraterritorial water and sewer customer has applied for service, abides by Sebring's Farmers Home Administration [FmHA] approved regulations and pays quarterly bills with a nonresident surcharge.

Water is also provided to the extraterritorial residents of Beloit under a second water agreement, also affected by the FmHA loan. The Village of Beloit is an even smaller village than Sebring, located one mile east of Sebring's village limits. Beloit has a forty year contract with the Sebring for supply of water to its residents which is for the same term as Sebring's FmHA loan.[5]

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[4] Contrary to its claim at p. 13, petitioner first raised the issue of the condition of MRWA lines only after the commencement of this litigation. The condition of extraterritorial distribution lines was not discussed in the extensive and detailed preamble to Ordinance 1477-90. Pet. 114a-115a. The engineer's study was contracted for and performed only after litigation began.

[5] It is the extension of new water service east of Beloit which was at issue in the Ohio case cited by petitioner, *Krug v. Sebring*, Pet. 129a-133a.

By the late seventies, Sebring's water system needed major repairs. Because Sebring's water supply was inadequate, there was a moratorium on new taps. That is why respondent Rouse has only Sebring sewer service and not water too. On January 26, 1978, Sebring filed its application for a grant/loan combination from FmHA. As authorized by Congress, FmHA administers a community facilities loan and grant program designed to provide potable, i.e. safe drinking, water to rural residents. 7 U.S.C. 1921 et seq.

Because improvements were financed with a forty year loan at 5% from the FmHA in 1981, Sebring has federal contractual and legal obligations to maintain service where legal and feasible without conditioning its continuation upon annexation. Loan Resolution ¶14, Pet. pp. 6-8. Petitioner's contentions about the service area map and lack of a "meeting of the minds" are meritless and will be discussed below in Section III.

In the Omnibus Budget Reconciliation Act of 1986 [OBRA 1986], Pub. L. 99-509, §1001, Congress ordered the sale of FmHA loans, including petitioner's, to meet budget deficit reduction targets. All terms and conditions of the original loan agreements between the borrowers and FmHA remained unchanged except for the graduation provision which is not at issue here. General Electric Credit Corporation [GECC] became the master servicer of Sebring's loan when it was purchased by Private Trust 1987a [the Trust]. As both the Courts below correctly held, petitioner's obligations continue unchanged, notwithstanding the congressionally mandated sale of the FmHA loan to private investors in 1987.

Congress subsequently amended § 1001 of the 1986 OBRA to clarify that earlier prohibitions on the curtailment of service still applied notwithstanding the transfer. Agricultural Credit Act of 1987, Pub. L. 100-233 §803, 101 Stat 1714, recorded at 7 U.S.C.A. §1929a note. FmHA and the Trust also entered into a side agreement Memorandum of Understanding Regarding Enforceability [MOU], Resp. 11a-16a, which calls for FmHA to repurchase loans which become defective upon a lower court finding that the Loan Resolution is unenforceable because the loan is "no longer held or insured by the government."[6] Under this MOU the federal government's potential repurchase liability is over two billion dollars.

Sebring's response to the sale of its loan to the Private Trust was to make its payments and reports to GECC, the master servicer, rather than to FmHA. Its policy about extension and continuation of service did not change. Notwithstanding the 1987 transfer, Sebring kept all of its commitments under the Loan Resolution

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[6] The full text of the enforceability clause provides:
The provisions hereof and the provision of all instruments incident to the making or insuring of the loan, unless otherwise specifically provided by the terms of such instruments, shall be binding upon the association as long as the bonds are held or insured by the Government. The provisions of Section 8 through 13 hereof may be provided for in more specific detail in the bond resolution or ordinance; to the extent that the provisions contained in such bond resolution or ordinance should be found to be inconsistent with the provisions hereof, the provisions shall be controlling as between the association and the Government.

including continued service to existing customers, and extension of taps to extraterritorial customers like Mark Wayne, until 1990. In October 1990, days after receiving the United States census results which changed Sebring's status from a city back to village, because its population fell below 5,000, Ohio Rev. Code §703.01, petitioner enacted Ordinance 1477-90, Pet. 114a-118a, to implement the policy of annexation-for-water under which respondents and their neighbors were threatened with discontinuation and nontransferability of existing water service. Pet. 5a, 36 F.3d at 523. Petitioner did not seek FmHA's concurrence before enacting this ordinance, as it is required to do.

Ordinance 1477-90 was the subject of a voter-initiated referendum held November, 1991, at which time it was defeated. Although under Ohio law a referendum stays the operation of the questioned ordinance, Ohio Rev. Code §731.29, both reviewing courts have found that Sebring officials, nevertheless, implemented the illegal policy. Pet. 6a, 36 F.3d 523-24, 72a. At trial Sebring's city manager, Charles Teiche, and its mayor, Michael Pinkerton, admitted that on the advice of petitioner's counsel, Ken Cardinal, notwithstanding the referendum, they had begun to implement the policy underlying referended Ordinance 1477-90, to require annexation as a condition of *continuation* of service. This was a departure from the prior policy of Sebring, which had sometimes linked agreement to annex only with *extension* of new water and sewer service.[7]

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[7] Sebring persists in its unique interpretation that water or sewer service to a previously served parcel becomes "new" service when ownership is transferred. This novel

The uncertainty of service availability caused by petitioner's implementation of a policy under an ordinance that is a nullity, meant that respondents Mark and Carla Wayne could not qualify for FHA financing and Bret and Brenda Smith were forced to haul drinking water. Costello and Kendrick were unable to complete the sale of their homes, notwithstanding signed purchase agreements, because Sebring extended its new policy of no new water and sewer customers to purchasers and transferees of parcels with existing service. Jeff and Nancy Stuchell were forced to sell their mobile home at a loss, when they were denied reconnection after a fire. The threat of termination of water services upon the sale of an extraterritorial resident's property decreased the value of all homes affected by the ordinance, because they were virtually impossible to sell. The lower courts correctly summarized the specific injuries particular to each household. Pet. 6a-7a; 36 F.3d 524; 72a-74a.

Petitioner's elected and appointed officials pursued the policy, even after having been notified of the individual hardships this caused the respondents, and notwithstanding advice from Mahoning County officials as to the public health hazard created by terminating water. Petitioner ignored clear directives from both FmHA and the Trust, the current note holder, by its agent GECC that Sebring should honor Paragraph 14 of the Loan Resolution and that Sebring's conduct was a breach of the federal loan agreement.

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interpretation finds no support in the case law: The right to water and sewer service runs with the land. The determinative event is when the property is tapped in. All plaintiffs own property which has been tapped into the Sebring water system prior to the enactment of Ordinance 1477-90.

The complex story involves the United States government's potential liability, under this MOU, to repurchase defective loans in the amount of two billion dollars – a sum nonexistent in the current deficit-ridden federal budget. The respondents were the victims in the simple story. Every taxpayer in the United States will be victimized by the conduct of petitioner if certiorari is granted and the complex story is played out.

REASONS TO DENY THE WRIT

I. IN A CLAIM UNDER 42 U.S.C. SECTION 1983, A MUNICIPAL CORPORATION MAY NOT JUSTIFY ITS REFUSAL TO CONDUCT DISCOVERY BY RELYING ON THE STAY OF DISCOVERY THAT ACCOMPANIES QUALIFIED IMMUNITY

The Defendants herein were the Village of Sebring, the Mayor of Sebring, Michael Pinkerton, and each of the village council members. (Pet. ii). The mayor and the council members were sued both in their official and individual capacities. (*Id.* at ii). The same attorneys represented the Village of Sebring and all the individual defendants, in both capacities. The only exception to this was councilman James Daniels who was represented in his individual capacity by attorney William Shetler, who merely filed an appearance, and attended two conferences.

Petitioner first appeared in this case on October 11, 1991. Discovery was stayed on November 14, 1991, until February 29, 1992, to allow settlement negotiations. On March 5, 1992, the Trial Court set the case for trial and ordered that discovery be completed by June 1, 1992. Sebring engaged in no discovery and on April 27, 1992, the individual defendants filed for judgment on the

pleadings based on qualified immunity. On April 28, 1992, these same defendants moved to stay discovery. On May 6, 1992, the Trial Court granted the Motion to Stay Discovery, "In light of the pending motion, [qualified immunity] the Court hereby stays discovery *solely as it regards the Defendants named above [all defendants except Sebring]. Discovery on the remainder of the case will continue until June 1, 1992, as originally scheduled.* (emphasis added). Pet. 39a. Petitioner was on notice that it had a duty to proceed with discovery.

A. The Trial Court's Refusal to Stay Discovery Between Petitioner and Respondent did not Violate any of the Policies that Underlie the Stay of Discovery that Accompanies Qualified Immunity.

Respondents sent out interrogatories and requests to produce. In contrast, petitioner conducted no discovery; however, it required none because respondents had provided discovery by attaching extensive affidavits to their motion for preliminary injunction that were signed by respondents seeking monetary damages and disclosed all relevant information.

Petitioner cites *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and several subsequent cases to support its argument that no discovery should proceed by any party on any issue until the question of qualified immunity is resolved. Pet. at 18. In all the cases cited by petitioner, the only defendant was a government official and therefore a favorable ruling on the issue of qualified immunity would end the case. However, herein, in addition to the individual Village officials, the Village itself was a defendant. This, along with the fact that the same attorneys

represented both the officials and petitioner, completely distinguishes this case from those cited by petitioner. Regardless of the outcome on qualified immunity, these same defense attorneys would have to conduct discovery on behalf of petitioner, since qualified immunity can only be raised on behalf of individual government officials and not by a municipal corporation. The Court of Appeals noted this distinction:

> The problem with this argument [stay of all discovery pending decision on qualified immunity] is that the Village itself did not move, and could not have moved, for dismissal on this basis [qualified immunity]; and therefore it should have proceeded with discovery during the assigned discovery period.

36 F.3d at 330.

When a defense of qualified immunity is raised, the policy of staying discovery protects government officials from the burden of discovery until the immunity issue is decided.

> [B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery . . . Until this threshold immunity question is resolved, discovery should not be allowed.

Harlow v. Fitzgerald 457 U.S. 800, 817 (1982).

The policy of protecting individual government officials, which underlies a stay of discovery, is not involved herein. The stay of discovery in *Harlow* was never intended to excuse petitioner discovering respondents' case. Sebring is not seeking to use *Harlow* as a shield against unwarranted discovery but is instead using it to excuse its own failure to conduct discovery.

B. Petitioner Waived this Error by Failing to Raise it Before the Trial Court or the Court of Appeals.

Petitioner argues that discovery should have been stayed because Defendant Daniels would have faced the "dilemma" of incurring the expense of discovery or foregoing discovery while awaiting the Trial Court's decision on the defense of qualified immunity, thereby potentially prejudicing his defense. Pet. 20. Petitioner never raised Defendant Daniels' alleged dilemma at the trial court or at the Court of Appeals. In their brief before the Sixth Circuit, petitioner's entire argument on discovery was twenty-three (23) lines long and did not raise this issue. If this argument had been timely raised, respondents would have dismissed councilman Daniels in his individual capacity, thereby eliminating any alleged dilemma. Since petitioner did not raise this issue in the lower courts, it has failed to preserve the issue. *California v. Taylor*, 353 U.S. 553, 556 n.2 (1956).

C. Any Discovery Abuse Would Only Affect Damages, not Liability.

Respondents sought declaratory and injunctive relief to enforce Sebring's obligation to continue water and sewer service so respondents could continue to enjoy these necessities of life. The defense of "qualified immunity is ordinarily available only from damages and not from injunctive relief." *Webster v. Sowders*, 846 F.2d 1032, 1039, n.5 (6th Cir. 1988). The stay of discovery that accompanies qualified immunity therefore only accompanies respondents' damage claims. Petitioner should have proceeded with discovery since respondents' claims for injunctive and declaratory relief against the government

officials would have remained regardless of the decision on qualified immunity.

The Trial Court granted judgment as a matter of law for respondents. The standard for that is:

> When reviewing a district court's decision to grant or deny a motion for judgment as a matter of law, we apply the same standard as that used by the district court: the court should neither weigh the evidence, evaluate the credibility of the witnesses, nor substitute its judgment for that of the jury; rather it must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. (Citations omitted). "Only when it is clear that reasonable people could come to but one conclusion from the evidence should a court grant a motion for directed verdict." (Citations omitted).

36 F.3d 525, Pet. at 10a.

Petitioner is not arguing that the judgment as a matter of law was error.[8] The Trial Court held, as a matter of law, that Resolution #575-81 passed by petitioner on September 14, 1981, to obtain the loan from FmHA was still in force despite the sale of the loan by FmHA. Pet. 85a-86a. This Loan Resolution contained a promise by Sebring that it would serve everyone in the service area if it were legal and feasible. Petitioner does not dispute that all of the respondents have or had water service so it is uncontroverted that service was both legal and feasible.

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[8] Petitioner only argues that respondents do not state a claim. If respondents had stated a claim under 7 U.S.C. §1921, et seq., as they did, then the directed verdict was proper.

36 F.3d 526, Pet. 11a. Therefore no discovery from respondents could have helped petitioner on the liability question.

D. The Lack of Reported Cases Demonstrates that this Question is Unimportant and not Ripe for Review.

Few cases discuss the discovery issue raised by petitioner. Respondents sued a municipal corporation and its elected legislative officials, in both their official and individual capacities. All defendants are being defended by the same attorneys. This same situation is common in civil rights cases. If the error allegedly committed herein were as grievous and prejudicial as petitioner argues, there would be dozens of reported cases on this issue. Petitioner does not cite one reported case on the exact issue that it is raising. This lack of cases shows that the Federal Courts have not considered this an important issue. This is an issue that has never generated a reported Court of Appeals decision.

The lack of reported cases also shows that this question is not ripe for review. It would be premature for this Court to hear this issue without the benefit of lower court decisions.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE LEGAL ISSUES PRESENTED IN THIS LITIGATION.

Uniformly, the circuits have correctly interpreted the dual purposes of the legislation which authorized the FmHA Community Facilities Loan Program: to preserve

the customer base undiminished to assure loan repayment, and to protect the rural water users' access to safe drinking water.

All the circuits, including the Sixth in the opinion below, have consistently concluded that Congress intended residential users such as respondents to be the ultimate program beneficiaries and that the customer base is sacred. *Wayne v. Sebring*, 36 F.3d 517 (6th Cir. 1994); *CSL Utils. Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 134 (7th Cir.) cert. denied ___ U.S. ___, 115 S. Ct. 65 (1994), (distinguishing between permitting an existing wholesale customer to improve its water system and the forbidden substitution of a third party water-supplier to compete with FmHA-indebted Jennings.) *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311 (7th Cir. 1989); *Glenpool Util. Services v. Water Dist. No. 2*, 861 F.2d 1211, 1213 (10th Cir. 1988); *City of Madison, Miss. v. Bear Creek Water Ass'n*, 816 F.2d 1057 (5th Cir. 1987); *North Shelby Water Co. v. Shelbyville Mun. Water*, 803 F. Supp. 15 (E.D. Ky. 1992); *Jennings Water, Inc. v. City of North Vernon, Ind.*, 682 F. Supp. 421, 425, (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (1989); *Pinehurst Enters. v. Town of Southern Pines*, 690 F. Supp. 444, 451 (M.D.N.C. 1988); *Moore Bayou Water Ass'n v. Town of Jonestown*, 628 F. Supp. 1367 (N.D. Miss. 1986). *Rural Dist. No. 3 v. Owasso Utils. Auth.*, 530 F. Supp. 818 (N.D. Okla 1979). Because there is no conflict among the circuits, there is no need for the Supreme Court to address this issue.

A. The Intricacies of the FmHA Water Facilities Loan Program Are Not of Enough Importance to Merit a Grant of Certiorari.

The FmHA Community Facilities Program is an extremely insignificant federal benefits program, even

when measured against the entire budget for the whole Department of Agriculture. There are fewer than a dozen reported cases in the entire 34 year life of the water facilities loan program under the Consolidated Farm and Regional Development Act. 7 U.S.C. §1926(a) and (b). The FmHA loan and grant program is a modest federal benefits program – crucial to those receiving its services, but not affecting the millions who receive benefits from Medicaid, Medicare, AFDC or the Veterans Administration. The lower court decisions do not create additional benefits for respondents, nor increase the burdens of federal or state agencies. Denial of the petition for certiorari will simply leave in place petitioner's obligation to continue water service to paying customers – an obligation freely undertaken 15 years ago in order to receive a federal benefit. "[A]cceptance of [federal] funds entails acceptance of the conditions that accompany them." *See Glenpool Util. Services v. Water Dist. No. 2*, 861 F.2d 1211, 1215 (10th Cir. 1988). The petition for certiorari should be denied.

B. The Facts are Unique and Unlikely to Recur.

As seen from the extensive time spent by both petitioner and respondents on retelling the facts, they are both complex and unique. Although there are over 6400 FmHA loans with a value of two billion dollars, held by the Private Trust, there is no other reported case of the need for facility users to enforce their right of action under the Loan Resolution. This recorded case alone presents the bizarre scenario of a FmHA financed borrower declaring war on its own customer base and seeking to restrict its service territory, thereby increasing the costs to its own users. Given both the uniqueness and complexity of the

facts, it is clear that this proceeding does not involve a question which merits the attention of this Court.

III. THE PETITION CONTAINS NUMEROUS FACTUAL MISSTATEMENTS WHICH, IF RELIED ON, COULD LEAD TO AN IMPROVIDENT GRANT OF CERTIORARI.

Space prohibits a complete discussion of the petition's factual errors. The Maple Ridge Water Association [MRWA] has never supplied water to residents and petitioner's water customers have never voluntarily disconnected and returned to well water.[9] Petitioner misstates the water/annexation policy from 1959-1981[10] and from 1981-1990.[11]

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[9] Petitioner misleads the court when it implies that either the drilling of private wells or securing water from the MRWA are alternatives. The MRWA ceased to exist over 20 years ago, its mission having been completed when the pipes were laid at its expense and given to petitioner. Those pipes are now part of the property pledged by Sebring as security for its loan from FmHA. The MRWA never did supply its own water, bill customers or control the distribution system.

[10] Petitioner recited that it had consistently linked extension of water service with requests to annex or cooperate with annexation. This is simply not true. Petitioner has failed to establish that any of the named respondents had prior commitments to annex that they have not honored. None of the 37 tap-in agreements discussed at pages 11-12 of the petition were signed by any of the respondents or predecessor owners of their property. Furthermore, no respondent has ever been requested to cooperate with annexation until the November 1990 ordinance. During the tap moratorium, the alleged annexation policy was not implemented.

[11] Petitioner misstates that the water for annexation policy continued uninterrupted to present. Sebring abandoned this policy in order to secure FmHA financing. The issuance of a

Petitioner's dispute over the admissibility of the FmHA service area map is meritless. Resolving evidentiary disputes and questions of admissibilty is not an appropriate use of this Court's limited resources. The conclusion that the service area, at the very least, includes the service lines as they existed when the loan was made, can be reached without any assistance from the disputed service area map. The customer base upon which FmHA relied to guarantee the financial viability of the loan clearly includes the existing users in Smith Township and Beloit as well. The lower courts correctly relied on the map and concluded that all respondents reside within the service area as it existed at the time of the loan. Pet. 11a, 15a; 36 F.3d at 526, 527; Pet. 84a-85a. Petitioner's unhappiness with the admission and use of its own document is no basis for granting its petition. The writ of certiorari should be denied.[12]

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permit and tap to respondent Wayne without the condition of annexation supports this explanation. There is no evidence that Sebring implemented its water/annexation policy at any time between the date of the 1981 FmHA loan and enactment of Ordinance 1477-90 in November of 1990. Further City Manager Teiche stated in a letter dated July 26, 1988, to an applicant for extension of a water main, that Sebring "did not mandate annexation."

[12] As part of its FmHA application, Sebring provided a map, the validity of which petitioner disputes, that defined the service area, which included all of the villages of Sebring and Beloit and significant portions of Smith Township beyond the limits of existing water lines. FmHA used the service area map certified by Sebring and its engineer to define the service area referred to in Sebring's Loan Resolution. The service area map indicated Sebring's intention to continue to provide service to existing customers in Smith Township and to extend service within the service area where it was legal and feasible.

From the first meetings with FmHA through the final closing documents, extraterritorial users were part of the service area and user base.[13]

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[13] From the beginning of its discussions with FmHA, Sebring was aware of its "moral obligations" to continue to serve its extraterritorial customers. The application evolved with proposed elements of the water system improvement project being dropped and added, but through all this, contrary to petitioner's suggestion, Sebring's description of its service area did not change. Sebring was ultimately approved in 1981 for a $3,575,000 loan at five percent interest. The FmHA loan financed improvements which provided Sebring with a capacity of 2.5 million gallons per day. Sebring has never contended, nor could it, that there is insufficient water to serve respondents.

To qualify for funding, petitioner complied with FmHA requirements, many of which addressed petitioner's obligation to nonresident users. FmHA approved regulations, discuss the surcharge for nonresident users and prohibit any other discrimination against them. Sebring Water Regulations, Section 119, Resp. 19a. The temporary non FmHA bonds at 8% relied on a customer base of both nonresidents as well as residents to assure repayment of the loan. "Upon completion, project improvements are anticipated to serve all utility's present customers in and *outside the city limits.*" (emphasis supplied.) Sebring then refinanced with FmHA at 5% – below market rate. Sebring adopted a Loan Resolution as contained on a form provided by FmHA which set forth petitioner's obligations to the lender and its users. Pet. pp. 6-8. This resolution, was adopted as Resolution No. 575-81 on September 14, 1981. The Loan Resolution is required to be adopted prior to the loan closing and the start of construction. *See* 7 C.F.R. §1942.17(n). Crucial to this lawsuit are the loan resolution, and the regulation which prescribes its use, which explicitly create a direct cause of action by any customer against the borrower if services

It is disingenuous for petitioner to argue that the Bond Ordinance does not reference the term "service area." There was no need to, because the Bond Ordinance in its definition section incorporated by reference all of the Loan Resolution, including the continuing obligation to provide service. Sebring's ratification of its preparatory steps with FmHA means that the obligation to continue service has been incorporated into the Bond Ordinance. 7 C.F.R. §1942.17(n).

The lower courts correctly dismissed petitioner's absurd contention that there was no meeting of the minds. Pet. 15a, 36 F.3d 527. This Court should also.

IV. BORROWER'S OBLIGATIONS TO NONRESIDENTIAL USERS SURVIVE THE SALE OF THE FMHA LOAN PORTFOLIO MANDATED BY THE OMNIBUS BUDGET RECONCILIATION ACT OF 1986.

Respondents' action to enforce the terms of the Loan Resolution, and secure money damages for those injured, would have been straightforward, had not FmHA been compelled by an act of Congress, the Omnibus Budget Reconciliation Act of 1986 [OBRA 1986], Pub. L. 99-509, §1001. OBRA 1986 required FmHA to divest its portfolio of over 6,400 rural development loans for small water supply systems and other community facilities programs

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are not provided even though it is legal and feasible to do so. The lower courts have correctly held that it is legal and feasible to provide service to respondents who all reside within the service area. Pet. 11a-12a, 36 F.3d at 526; 84a-85a. Finally Sebring lifted the freeze on water taps that had been imposed in the seventies during the period of water shortage, and agreed to extend service to *all* who desired within the service area.

to a private entity, the Private Community Program Loan Trust 1987 A [Trust]. The legislative history reflected merely a desire to reduce the size of the federal deficit; there was no discussion of Congressional intent to alter or limit its program to provide water to rural residents.

The transfer from FmHA to the Trust in no way affects or diminishes Sebring's obligation to continue existing water service and extend it within the service area until at least 2022. Furthermore, all parties to the transfer and present servicing of Sebring's loan maintain that all of Sebring's obligations under the original Loan Resolution and bond documents continue in full force and effect. Both the assignment documents and the loan sale agreements between FmHA and the Trust require that *all* obligations of the borrower survive the transfer except for the graduation provision which is not at issue here.

Petitioner's reliance on the enforceability or "bail-out" clause from Loan Resolution Form 442-47 is misplaced.[14] Petitioner wrongly used this as an excuse to deny continuation of service to respondents. As explained at trial, the language "shall be binding upon the association as long as the bonds are held or insured by the Government" applies only when interim financing, the temporary bonds, are never turned over to FmHA. It has never been used nor was it intended to permit a borrower to avoid the obligations under its Loan Resolution after it has received FmHA funding.

FmHA has confirmed this interpretation by a January 18, 1991, letter to petitioner reiterating that Sebring

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[14] For the full text of the enforceability clause, see fn 6 *supra*. This form has been superceded.

remained obligated to serve extraterritorial users notwithstanding FmHA's sale of the loans. Resp. 17a-18a. The lower courts correctly adopted this interpretation. Pet. 14a, 36 F.3d 527; 85a-86a.

On April 5, 1991, General Electric Capital Corporation [GECC], the current servicer of Sebring's note, by letter advised the Mayor and Village Solicitor Ken Cardinal that paragraph 14 was still binding and referred to the Memorandum of Understanding. Resp. 3a-9a. After GECC informed petitioner that the Trust considered Sebring to be bound by all conditions of the Loan Resolution, including paragraph 14's commitment to continue service to existing customers, the village adopted Resolution 805-91, which repealed Loan Resolution No. 575-81 in order to avoid its obligations to respondents, stating that the loan resolution "is of no further legal significance and is one only of historic purposes." Sebring Resolution No. 805-91.

GECC sent a subsequent letter to the village council, which stated in part:

> The Council apparently approved Resolution No. 805-91 without regard to the advice contained in our April 5, 1991 letter.
>
> This is to notify the Council that we do not accept the validity of the Council's repeal of Resolution No. 575-81 [the Loan Resolution]. The Loan Resolution remains a valid, binding and enforceable agreement between Sebring and the holder of the Bond.

Resp. 1a-2a.

If petitioner Sebring is allowed to disavow its obligations under the Loan Resolution and other loan documents, because of the "enforceability clause," Pet. 17-18, fn. 4, the loan will be considered defective. This "defect" occurs in all of the Community Facilities loans made

pursuant to Loan Resolution Form 442-47 and sold to the Trust. Under this MOU, FmHA can be required to repurchase any defective loan – including Sebring's. Once the loan is repurchased by FmHA, Sebring's obligation to continue service in paragraph 14 of the Loan Resolution is indisputable. This MOU itself then constitutes a type of insurance by the federal government. The lower courts reached the same ultimate conclusion, i.e. that the obligation to continue service survives the sale, with greater economy of governmental resources. This correct result should not be disturbed by granting the petition for certiorari.

V. REVERSAL OF THE LOWER COURTS' HOLDING THAT THE OBLIGATIONS OF THE LOAN RESOLUTION SURVIVE FMHA'S FORCED SALE OF THE LOAN PORTFOLIO WOULD TRIGGER OPERATION OF THE MEMORANDUM OF UNDERSTANDING – A POTENTIAL TWO BILLION DOLLAR LIABILITY FOR TAXPAYERS.

If this Court were to grant certiorari and find, as petitioner urges, that Sebring's obligations undertaken in its 1981 Loan Resolution, including paragraph 14 and its continuation of service obligation, are no longer enforceable because of the forced sale by FmHA to reduce the deficit, petitioner's loan will be "defective." Under the MOU, FmHA must either replace it or buy it back. This Court's approval of petitioner's noncompliance with the Loan Resolution would encourage borrowers around the country to disavow both service and repayment obligations.

Ultimately, every loan made pursuant to Loan Resolution Form 442-47 could be deemed by the Trust to be

defective. These actions would trigger FmHA's requirement, under the MOU to substitute or repurchase defective loans – including Sebring's and some 6,500 others. Resp. 11a-17a. If petitioner succeeds, the federal government will have to find an additional two billion dollars to repurchase the loan portfolio, an expenditure we taxpayers can ill afford. The lower courts correctly held that all of the borrower's obligations continue unabated, and that the loan resolution is enforceable notwithstanding the sale of the loan. The petition for certiorari should be denied.

VI. THE LOWER COURTS CORRECTLY FOUND A CAUSE OF ACTION EXISTS UNDER FMHA'S COMMUNITY FACILITIES LOAN PROGRAM AND THE CIVIL RIGHTS ACT FOR RESPONDENTS WHO ARE ENTITLED TO CONTINUING WATER SERVICE.

FmHA makes loans to non-profit associations, including petitioner, for water supply projects. 7 U.S.C. §1926(a)(1), discussed in *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311, 312, n.1 (7th Cir. 1989). Respondents, as rural residents, are precisely the group Congress intended to benefit by making loans for water and sewer systems "all primarily serving farmers, ranchers, farm tenants, farm laborers, and *other rural residents*." 7 U.S.C. §1926(a)(1) (emphasis supplied). Earlier versions of the Act preclude water and sewer loans to towns of greater than 5500. Subsequent amendments have raised the threshold, but the focus remains rural residents, which the Sixth Circuit correctly found includes respondents. Pet. 18a, 36 F.3d 528.

FmHA requires the borrower to repay the loan, charge customers reasonable rates and continue and

extend service to all customers that could feasibly and legally be served. The last requirement – continuation and extension of service – was to ensure full implementation of the Congressional policy to provide safe drinking water to rural populations, including, in some instances, small towns.

> This provision [7 U.S.C. §1926(a)] authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water.

S. Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code, Cong. & Admin. News 2243, 2309 *see also id.* at 2305.

Water associations funded by FmHA such as petitioner, are required to accept new customers within the service area on demand. "[A]ny prospective user within [50 feet of the waterline] could receive water service. . . . simply by making application . . . The water district would then be under an obligation to provide the service, even if that provision would require a line extension or a road bore." *Glenpool Util. Services v. Water Dist. No. 2*, 861 F.2d 1211, 1213 (10th Cir. 1988).

To further ensure the security of the financing and the water supply to rural customers, in 1961 Congress added an additional prohibition which directly limits the options of respondents herein to secure an alternate supply of water. According to its legislative history, the purpose of this prohibition is two-fold:

> A new provision [7 U.S.C. §1926(b)] has been added to assist in protecting the territory served

> by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.

S. Rep. No. 566, 87th Cong., 1st Sess, *reprinted in* 1961 U.S. Code, Cong. & Admin. News 2243, 2309, *see also id.* at 2305. Case law has consistently and unanimously failed to find any exceptions from this express prohibition of competing water suppliers even when no threat to the fiscal integrity of the underlying loan has been established, *Glenpool Util. Services v. Water Dist. No. 2*, 861 F.2d 1211, 1213 (10th Cir. 1988); or when it means overriding the state's power of eminent domain. *City of Madison, Miss. v. Bear Creek Water Ass'n*, 816 F.2d 1057 (5th Cir. 1987) and *Moore Bayou Water Ass'n v. Town of Jonestown*, 628 F. Supp. 1367 (N.D. Miss. 1986). The ban on customers, whose service was financed by an FmHA loan, seeking an alternate water supply applies even when the borrower, new supplier and water customer were all willing to waive Section 1926(b). *Jennings Water, Inc. v. City of North Vernon, Ind.*, 895 F.2d 311 (7th Cir. 1989).

"Section 1926(b) establishes a bright line rule; it unambiguously prohibits any curtailment or limitation of an *FmHA indebted association's* service by municipal annexation or inclusion . . . " *Pinehurst Enters. v. Town of Southern Pines*, 690 F. Supp. 444, 451 (M.D.N.C. 1988) (emphasis in original). *See also: Rural Dist. No. 3 v. Owasso Util. Auth.*, 530 F. Supp. 818 (N.D. Okla 1979).

> Courts have uniformly read the 1926(b) ban as:
> Unequivocal – it prohibits *any* curtailment or limitation of the service provided by a rural association by municipal expansion, and its applicability does not hinge on whether specific customers or areas were listed on or deleted

> from the loan forms or on the financial impact of the service decrease on the rural association.

Jennings Water, Inc. v. City of North Vernon, Ind., 682 F. Supp. 421, 425 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989) (emphasis in original).

Even though the stated purpose of this provision in judicial interpretations has been focused on assuring repayment of the *United States government*, Congress clarified that its interest in preserving the terms and conditions of the loan continues notwithstanding the fact that FmHA may no longer be the holder of the loan. "Applicability of Prohibition on Curtailment or Limitation of Service – Section 306(b) of the Consolidated Farm and Development Act (7 U.S.C. §1926(b)) shall be applicable to all notes or other obligations sold under this section [Pub. L. 99-509 §1001]." Agricultural Credit Act of 1987, Pub. L. 100-233 §803, 101 Stat. 1714, recorded at 7 U.S.C.A. §1929a note.

Under the absolute ban of 7 U.S.C. §1926(b), no other municipality or private franchise can provide water to respondents who are all within Sebring's FmHA service area. *CSL Utils. Inc. v. Jennings Water, Inc.*, 16 F.3d at 135. Sebring's willingness to terminate existing water customers curtails its customer base just as surely as would respondents' resort to a third party supplier. Petitioner cannot be permitted to twist the facts to fit the ruling in *CSL Utils. Inc.*, 16 F.3d at 135. No existing customers of the Sebring water system have ever disconnected Sebring's water to use their own wells. Resort to competing suppliers is illegal under 7 U.S.C. §1926(b). More importantly, resort to other sources, legal or not, is an impossibility. It is the poor quality of the water in the area and the loss of well water to strip mining that have inspired respondents' tenacious fight to protect their

right to Sebring's water. There is no alternate supply. If there were, respondents would not have sued for continuation of water under the Loan Resolution and would not be opposing this petition for certiorari.

Given the purpose of the loan program, Congress would not preclude users from seeking an alternate water supply if the loan sale terminated users' rights to continued water service by the FmHA financed borrower. Petitioner's argument that its obligation to serve extraterritorial customers ended upon transfer must fail in light of this pronouncement. 7 U.S.C. §1926(b).

Petitioners are simply wrong when they state that they have demonstrated that §1926(b) was not intended to benefit respondents. The cases addressing FmHA water loans are uniform that respondents are precisely whom Congress intended to benefit.

> [T]he primary beneficiaries of section 1926(b)'s ban on association service curtailment are not the associations themselves, but rather, the FmHA and the individual rural consumers who would not have inexpensive and reliable water service without FmHA-supported rural water associations.

Jennings Water, Inc. v. City of North Vernon, Ind., 895 F.2d 311, 317 (7th Cir. 1989).

FmHA Form 442-47, which was the Loan Resolution 575-81 approved by petitioner, contained language which gave respondents a direct right of action against petitioner if they were refused service when such service was legal and feasible. Pet. p. 7. This language was drafted pursuant to 7 C.F.R. §1942.17(n)(2)(vii) which contains the identical language. Pet. at 6. 7 U.S.C. §1989 delegates to the Secretary authority to promulgate implementing regulations. As discussed *supra*, 7 U.S.C. §1926(b), provides that no conditions or requirements may be imposed upon

those customers residing within the service area. This statutory framework creates enforceable rights but does not provide any enforcement mechanism. Thus, respondents have stated a claim under 42 U.S.C. §1983.

The following cases find that a cause of action can be founded on 42 U.S.C. §1983: *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (finding a cause of action under the Medicaid Act and regulations thereunder to enforce reasonable reimbursement of hospitals); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (finding a cause of action under the National Labor Relations Act to protect labor rights against governmental interference). *Wright v. Roanoke Redev. & Hous. Auth.*, 499 U.S. 418, 427 (1986) (finding a cause of action for tenants based on H.U.D. regulations). Unlike *Suter v. Artist M*, ___ U.S. ___, 118 L. Ed. 2d 1, 14 & n. 13 (1992), in the instant case regulations promulgated by the Secretary of Agriculture to enforce the Consolidated Farm and Rural Development Act, 7 U.S.C. §1921 et seq., establish a right to continuation of water service and condition receipt of federal moneys on the borrower's agreement to continue to provide water to new and existing customers within the service area. 7 C.F.R. §1942.17(n)(2)(vii). *See also* 7 C.F.R. §1942.17(b)(3); 7 C.F.R. §1942.17(d)(1)(i); 7 C.F.R. §1942.17(g)(2)(i)(B); 7 C.F.R. §1942.17(h)(2); and 7 C.F.R. §1942.19(10).

Petitioner cites *Ashbrook v. Block*, 917 F.2d 918, 926 (N. Jones, J.) and its Sixth Circuit progeny for the proposition that no cause of action may be found under the Consolidated Farm and Redevelopment Act against the FmHA itself for the way in which it administered a direct loan program to farmers, unrelated to 7 U.S.C. §1926(b). The

regulatory and statutory schemes and facts are so different that the cases are totally inapposite, which distinction did not escape Judge Jones who also wrote the opinion in *Ashbrook. Smith v. Dearborn Fin. Servs.*, 982 F.2d 976 (6th Cir. 1993) is distinguishable; the federal credit union regulations did not provide for a cause of action – FmHA's do.

Congress has established no comprehensive federal scheme that a §1983 action would frustrate. Rather, a §1983 action is essential in this case to effect Congress's policy of supplying water to rural residents.

Nor does 7 U.S.C. §1926(a)(20) aid petitioner's position. *Graham v. Goodcell*, 282 U.S. 409, 418 (1931) (allowing explicit retroactive changes to the tax code) is distinguishable from the new §1926(a)(20), which is not expressly retroactive, and has no legislative history at all, let alone one which would support implying retroactivity. " '[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.' " *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S.Ct. 1483, 128 L. Ed. 2d 256 (1994) (declining to apply certain Title VII provisions for damages retroactively to pending cases.) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

VII. THE LOWER COURT GRANTED JUDGMENT TO RESPONDENTS BASED UPON A VIOLATION OF FEDERAL LAW

The Sixth Circuit clearly defined the basis for the holding of the Trial Court:

> The district court provided three separate rationales for directing a verdict in Plaintiffs' favor on the issue of liability: first, that Sebring violated Plaintiffs' procedural due process rights;

> second, that Sebring violated its own Loan Resolution; and third, that Sebring violated the Consolidated Farm and Rural Development Act, 7 U.S.C. §1921 *et seq.* If we agree with even one of these rationales, we are obliged to affirm.

36 F.3d 525, Pet. 11a.

The Court of Appeals declined to reach the constitutional due process issue, *id.* at 525, but it did find that Sebring had violated its Loan Resolution and had violated 7 U.S.C. §1926(b). The Court of Appeals also held that respondents had stated a claim under 42 U.S.C. §1983. The Loan Resolution was required to be passed by 7 C.F.R. §1942.17(n)(2)(vii). This clearly provides a basis for the lower courts' holding that respondents have substantial federal law claims and therefore exercise of supplemental jurisdiction would be appropriate. 28 U.S.C. §1367(a).

If this Court were to find the statutory analysis unpersuasive, this Court could still affirm based upon the constitutional due process ground. Continued water and sewer service is a property interest that is entitled to due process protection. *Ransom v. Marrazzo*, 848 F.2d 398, 409 (3d Cir. 1988). The state law cases cited by petitioner have no application to the unique facts herein. Ohio law might not require a municipality to *extend* its water or sewer services beyond its municipal boundaries under certain circumstances. The facts herein, however, are a *continuation* of water and sewer services, not extension. Under these facts, Ohio law does require a continuation of service for a reasonable period of time. *Grandview Heights v. Columbus*, 174 Ohio St. 473, 190 N.E.2d 453 (1963). This is an interest that is entitled to due process protection.

VIII. THE COURT OF APPEALS CORRECTLY REMANDED TO THE DISTRICT COURT THE ISSUE OF EXTENDING THE INJUNCTION TO ROBERT AND SHARON ROUSE REGARDING SEWER SERVICE

Evidence was presented at trial by stipulation and testimony that two of respondents' households were sewer customers and whose service was threatened with termination by petitioner's policies underlying Ordinance 1477-90. The parties stipulated that Robert and Sharon Rouse had been connected to petitioner's Sanitary sewer system since 1977 and that Ordinance 1477-90 applies to sewer service as well as water service. Respondent Judy Costello was similarly situated as the Rouses with regards to their sewer service. Respondent Judy Costello did testify at trial and therefore a ruling on her request for continuation of sewer service will necessarily also apply to the Rouses. This was sufficient as discussed by the Court of Appeals:

> Plaintiffs contend that the district court erred in failing to extend the injunction to protect customers of Sebring's sewer service. The Rouses requested this relief in the complaint, at trial, and by post-judgment motion. However, the court below did not address this request at all.

36 F.3d 531, Pet. at 25a.

Respectfully submitted,

KAREN KENDRICK-HANDS
1067 Devonshire Road
Grosse Pointe Park,
Michigan 48230
(313) 885-7588

STEVE J. EDWARDS
Counsel of Record
4030 Broadway
Grove City, Ohio 43123
(614) 875-6661

GE Capital

General Electric Capital Corporation
10777 Westheimer, Suite 1200
P.O. Box 420250,
Houston, TX 77242-0250
713 785-6055

May 9, 1991

The Members of the Council of
The Municipality of Sebring, Ohio

RE: City of Sebring, Ohio $3,575,000 Waterworks System First Mortgage Revenue Bond (the "Bond")

Ladies and Gentlemen:

The undersigned is the servicer for the holder of the above-captioned Bond. This letter is to follow up our letter to Messrs. J. Michael Pinkerton, Charles Tieche and Kenneth Cardinal, Esq., dated April 5, 1991, a copy of which is attached.

We have recently been furnished with a copy of the Council's Resolution No. 805-91, passed April 22, 1991. In that Resolution, the Council purports to repeal Resolution 575-81, which was entered into by Sebring in connection with the issuance of the Bond on September 14, 1981.

The Council apparently approved Resolution No. 805-91 without regard to the advice contained in our April 5, 1991 letter.

This is to notify the Council that we do not accept the validity of the Council's repeal of Resolution No. 575-81. Loan Resolution No. 575-81 remains a valid, binding and

enforceable agreement between Sebring and the holder of the Bond.

If you have any questions or would like to discuss this matter, please contact the undersigned.

GENERAL ELECTRIC CAPITAL CORPORATION, as Master Servicer for Community Program Loan Trust 1987 A

By: _____
Ted A. Rosenberg, Manager
Commercial Servicing

cc: Kenneth Cardinal, Esq., City Attorney
Brenda Williams, Esq.
Dennis W. Townley, Esq.
William Hagy
Francis J. Marini, Esq.
Karen D. Kendrick-Hands, Esq.

GE Capital

General Electric Capital Corporation
10777 Westheimer, Suite 1200
P.O. Box 420250,
Houston, TX 77242-0250
713 785-6055

April 5, 1991

J. Michael Pinkerton, Mayor
135 E. Ohio Avenue
Sebring, Ohio 44672

Charles Tieche, City Manager
135 E. Ohio Avenue
Sebring, Ohio 44672

Kenneth Cardinal, Esq., City Attorney
135 E. Ohio Avenue
Sebring, Ohio 44672

Re: City of Sebring, Ohio, $3,575,000 Waterworks Systems First Mortgage Revenue Bond

Gentlemen:

General Electric Capital Corporation (GECC) is Master Servicer for Community Program Loan Trust 1987 A (the Trust), which is the owner of the City of Sebring's $3,575,000 Waterworks System First Mortgage Revenue Bond (the Bond). The Bond was originally issued to the Farmers Home Administration (Farmers Home or FmHA) on December 28, 1982, and was sold to the Trust on September 23, 1987.

GECC has received telephone calls and correspondence from Francis J. Marini, Esq. and Karen D. Kendrick-Hands, Esq. with respect to Ordinance No. 1477-90,

enacted by the Sebring City Council on November 26, 1990, and Ordinance No. 1481-90, enacted on December 27, 1990 (together, referred to herein as the Ordinances). Mr. Marini and Ms. Kendrick-Hands assert that as a result of the passage of the Ordinances the administration of City of Sebring has been refusing to allow the transfer of Sebring water service to properties located outside of the corporation limits of Sebring upon a sale of the properties. They argue that this policy violates the terms and conditions of the "Loan Resolution, Bond Ordinance, Bond and Indenture of Mortgage" relating to the Bond (collectively, the Bond Documents). They specifically refer to Section 14 of the Loan Resolution (FmHA Form 442-47), dated September 14, 1981, between Sebring and Farmers Home (Loan Resolution) which requires Sebring to "provide adequate service to all persons within the service area who can feasibly and legally be served and to obtain FmHA's concurrence prior to refusing new or adequate services to such persons".

Mr. Marini and Ms. Kendrick-Hands state that they have been told by Mr. Cardinal, the City Attorney, that he believes that the terms and conditions of the Loan Resolution are no longer applicable because FmHA no longer holds the Bond.

After talking to Mr. Marini and Ms. Kendrick-Hands and reviewing their correspondence, representatives of the Trust and GECC spoke on the telephone with Mr. Tesch. Mr. Tesch explained the background to the Ordinances and answered questions about the number of water users outside the corporation limits of Sebring and the effect of the Ordinances on those users.

Neither the Trust nor GECC, as Master Servicer, has any interest in becoming involved in political issues between Sebring and its water users. The Trust and GECC also recognize that the Bond is not currently in monetary default. However, we must inform you that all provisions of the Bond Documents are enforceable by the Trust against Sebring in accordance with their terms. And it our understanding that Farmers Home agrees with this position. Any breach by Sebring of its obligations under the Bond Documents would be a serious matter.

Mr. Marini and Ms. Kendrick-Hands have suggested that Mr. Cardinal may be relying upon the following language of the Loan Resolution to support his argument that the provisions of the Bond Documents, including Section 14 of the Loan Resolution, are no longer binding upon Sebring:

> "The provisions hereof and the provisions of all instruments incident to the making or the insuring of the loan, unless otherwise specifically provided by the terms of such instruments, shall be binding upon the association so long as the Loans are held or insured by the Government".

If the City Attorney is relying upon this sentence (hereinafter referred to as the Enforceability Language) to abrogate Sebring's obligations under the Loan Resolution, his reliance is misplaced for the reasons described below.

EXPLANATION OF ENFORCEABILITY LANGUAGE

The Bond (and the Bond Documents) are freely transferable. They contain no restrictions on transfer. The

Bond is stated to be a negotiable instrument, with provisions which deal with its registration and transfer. And Sebring has acknowledged the transfer of the Bond to the Trust. Yet the Enforceability Language, when read literally, appears to impair the ability of a transferee to enforce provisions of the Bond and the Bond Documents.

To resolve this apparent conflict between the Enforceability Language and the transferability of the Bond and the Bond Documents one must examine Loan Resolution Form 442-47 in its entirety as well as the context in which the Form was used by Farmers Home. One must read Form 442-47 in a way that gives full effect to its terms and the terms of the other Bond Documents entered into in connection therewith, including the terms permitting transfer of the Bond.

The Enforceability Language, if read literally, arguably would not only release Sebring from complying with the requirements of Section 14 of the Loan Resolution if, as is now the case, the government no longer hold Sebring's Bond, but would also release Sebring from *all* the covenants in all of the Bond Documents, unless otherwise specifically provided by the terms of such instruments. The Enforceability Language does not differentiate between Sebring's obligations under Section 14 of the Loan Resolution and its promise to repay the Bond. Such a reading, which would make the Bond unenforceable by a transferee, conflicts directly with the fact that the Bond was made transferable. The reconciliation of this apparent conflict is found in the provisions of the Consolidated Farmers Home Administration Act of 1961 (the Farmers Home Act).

Form 442-47 is one of the many documents that a borrower is obligated to sign during a Farmers Home loan application process that can take years to complete. It is signed long before a borrower offers its bond for sale. (Sebring's Form 442-47 was signed approximately 15 months before the Bond was issued). The Enforceability Language was added to Form 442-47 to release a borrower from its responsibilities under its bond documents if its bond is not actually purchased by the government; it was not intended to make a bond or related documentation unenforceable in the hands of a transferee.

Other provisions of Form 442-47 support this reading. For example, the introductory paragraph states:

> WHEREAS, the [borrower intends to obtain assistance from the Farmers Home Administration, United States Department of Agriculture (herein called the Government) acting under the provisions of the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 at seq. (sic)), in the planning, financing, and supervision of such undertaking and to purchasing of bonds lawfully issued, in the event that no other acceptable purchaser for such bonds is found by the [borrower].

This paragraph sets forth a precondition to the validity of Form 442-47 and the other bond documents: that the government purchase the borrower's bond. This precondition readily explains the Enforceability Language, for none of the provisions of the bond documentation would be binding as between the government and a borrower if the government did not purchase the bond because another suitable purchaser is found, then all provisions of the bond documentation are released and

the other purchaser will work out its own agreements with the borrower.

The precondition set forth above is based upon the provisions of the Farmers Home Act which state that a loan applicant will not be eligible unless he certifies that he is "unable to obtain sufficient credit elsewhere to finance his actual needs at reasonable rates and terms. . . . " 7 US.C. § 1983(a). This requirement is consistent with the Farm Home Act's purpose to fund improvements at below market rates for rural communities and to do so only if they cannot find reasonable credit elsewhere.

The importance of this precondition to the making of the loan is further shown in the Farmers Home Act's requirement of "an agreement by the borrower that if at any time it shall appear to the Secretary that the borrower may be able to obtain a loan . . . at reasonable rates and terms . . . the borrower will, upon request by the Secretary, apply for and accept such loan. . . . " 7 U.S.C. § 1983(c). This legislative directive is incorporated as a covenant in paragraph 2 of Form 442-47. The next purchaser or lender will create a new loan agreement with the borrower in connection with the refinancing of the bond. Thus, a principal purpose of the Farmers Home Act is to encourage a borrower to obtain funds from a source other than the government.

The Enforceability Language was inserted in Form 442-47 to cover those circumstances where the loan was originated by someone other than the government. It was not intended to invalidate a transfer to another party of a loan made by the government or to restrict the rights of the transferee of that loan.

We would also like to call your attention to a Memorandum of Understanding (MOU), dated September 13, 1989, between the Trust and Farmers Home. Under the MOU, if a court of competent jurisdiction were to hold that Section 14 of the Sebring Loan Resolution were unenforceable against Sebring because the Bond is now held by the Trust, the Trust would have the right to return the Bond to Farmers Home for a replacement bond. The effect of such a transfer to Farmers Home would be to reinstate any obligations of Sebring under the Loan Resolution that Sebring has called into question because of the Enforceability Language.

This letter is sent to you for your information. The Trust and the Master Servicer do not want to get involved in a local political dispute. However, the Trust and the Master Servicer would view an abrogation by the City of Sebring of its responsibilities under Section 14 of the Loan Resolution to be a breach of the Loan Resolution, giving rise to the Trust's and the Master Servicer's rights and remedies under the Bond Documents with respect to such a breach.

We are interested in discussing this matter with you whenever it is convenient.

Very truly yours,

GENERAL ELECTRIC CAPITAL CORPORATION

By: _____

Name: Ted A. Rosenberg
Title: Manager, Commercial Servicing

cc: Brenda Williams, Esq.
Counsel to GECC
Dennis W. Townley, Esq.
Counsel to the Trust
William Hagy
Farmers Home Administration
Francis J. Marini, Esq.
Karen D. Kendrick-Hands, Esq.

MEMORANDUM OF UNDERSTANDING (MOU) REGARDING ENFORCEABILITY REPRESENTATIVES

This Memorandum of Understanding Regarding Enforceability (Agreement) is entered into as of this *13th* day of *September,* 1989, by and between the United States of America, acting by and through the Farmers Home Administration (Farmers Home) and the Community Program Loan Trust 1987 A (the Trust) in order to confirm and clarify certain representations and warranties made by Farmers Home in the Loan Sale Agreement between Farmers Home and the Trust, dated as of September 1, 1987 (the Loan Sale Agreement), and in the Loan Substitution Agreement, Amended and Restated as of November 1, 1988 (the Loan Substitution Agreement).

All terms used, but not defined, herein shall have the meanings assigned to such terms in the Loan Sale Agreement or the Loan Substitution Agreement, as the context indicates.

WHEREAS, Farmers Home made certain representations and warranties as to the enforceability of each Original Loan in Section 3.02(d) of the Loan Sale Agreement (the Enforceability Representations).

WHEREAS, Section 4.04(a) of the Loan Sale Agreement and Section 3.01 of the Loan Substitution Agreement provide that the Enforceability Representations, as modified by Section 4.04(b) of the Loan Sale Agreement, are deemed to have been made as of the Settlement Date with respect to Substitute Loans;

WHEREAS, certain of the Original Loans and certain of the Substitute Loans contain Loan Resolution Form No.

442-47 or Loan Resolution Form No. 1942-47 having revision dates of 8/6/68 or thereafter, but before revision date of 3/89 (referred to herein as the Resolutions or a Resolution) in their Loan Files (such Loans are collectively referred to herein as the Limited Enforcement Loans).

WHEREAS, certain language contained in the Resolutions, which is set forth on Schedule A hereto (the Limited Enforceability Clauses), may be construed to limit or prevent the enforcement, by any person other than Farmers Home, of certain provisions of the Loan Documents relating to the Limited Enforcement Loans.

WHEREAS, the Limited Enforcement Loans may not have complied on the date that such Loans were sold or transferred to the Trust, and may not comply as of the date hereof, with the Enforceability Representations.

WHEREAS, some Substitute Loans include in further Substitution Groups may not comply with the Enforceability Representations because they will be Limited Enforcement Loans.

WHEREAS, although, pursuant to Section 3.06(a) of the Loan Sale Agreement with respect to the Original Loans and pursuant to Section 4.04(a) of the Loan Sale Agreement and Section 3.01 of the Loan Substitution Agreement with respect to the Substitute Loans, the Enforceability Representations do not expire, the Trust desires that Farmers Home confirm to the Trust that if any Limited Enforcement Loan or any provision of a

Resolution relating thereto which is material to the collectibility of payments of principal and interest and any covenant to maintain reserves and insurance for the benefit of such Loan, is not enforceable by the Trust because of a Limited Enforceability Clause, the Trust will be entitled to tender such Loan to Farmers Home as a Defective Loan.

WHEREAS, the parties have determined to enter into this Agreement to confirm the applicability of the Enforceability Representations to Limited Enforcement Loans.

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties hereto agree as follows:

1. The Trust and Farmers Home mutually agree that if a Limited Enforcement Loan, or any provision of a Resolution relating thereto which is material to the collectibility of payments of principal and interest and any covenant to maintain becomes unenforceable, as defined in paragraph 2 below, by the Trust because of a Limited Enforceability Clause, the Loan will be deeded to have violated the Enforceability Representations and Farmers Home shall permit, and shall accept, tender by the Trust to Farmers Home of any such Limited Enforcement Loan as a Defective Loan pursuant to the Substitution Group and Cash Settlement Amount procedures set forth in Section 4.01(b) of the Loan Sale Agreement. Farmers Home hereby confirms that the tender shall be permitted and accepted by Farmers Home without regard to any time limitation. The tender may be made at any time prior to payment in full of any such Loan if the Trust shall certify to Farmers Home, as provided in paragraph

2 below, that the Loan, or any provision of a Resolution relating thereto which is material to the collectibility of payments of principal and interest and any covenant to maintain reserves and insurance for the benefit of such Loan, is unenforceable.

2. The Trust may certify to Farmers Home that a Limited Enforcement Loan is unenforceable, as described in paragraph 1 above, if a court shall have held that the Loan, or any provision of a Resolution relating thereto which is material to the collectibility of payments of principal and interest and any covenant to maintain reserves and insurance for the benefit of such Loan, is unenforceable by the Trust because of a Limited Enforceability Clause. Although the Trust shall have no general obligation to appeal any such holdings, the Trust, at the written request of Farmers Home, shall appeal at least one (1) court decision to the highest court with jurisdiction over such matters in each individual state. If the lower court's ruling is affirmed on appeal, the Trust may exercise its rights under paragraph 1 above with respect to such Limited Enforcement Loan and with respect to similarly situated Limited Enforcement Loans within that state. If the final decision on appeal is such that the Loan would not violate the Enforceability Representations, the Trust shall not be entitled to tender the Loan to Farmers Home pursuant to this Agreement. Notwithstanding the foregoing no decision by any court regarding a Limited Enforcement Loan shall affect the rights of the Trust hereunder with respect to any other Loan unless the decision would be binding on the court having jurisdiction over such other Loan.

3. Nothing contained in this Agreement shall affect or negate the right of the Trust under the Enforceability Representations with respect to Loans that are not Limited Enforcement Loans.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date written above.

UNITED STATES OF AMERICA
acting by and through
Farmers Home Administration

By: _____
Acting, Administrator

COMMUNITY PROGRAM LOAN
TRUST 1987 A

By: Shawmut Bank, N.A., not
in its individual
capacity but solely as
1987 A Trust Trustee

By: _____
Name: Max Goldsmith
Title: VICE PRESIDENT

3

Consented to:

State Street Bank and Trust Company,
not in its individual capacity
but solely as Class A
Indenture Trustee

By: _____
Name: Denise M. Dever
Title: Assistant Vice President

Wilmington Trust Company,
not in its individual capacity
but solely as Class B
Indenture Trustee

By: _____
Name:
Title:

General Electric Capital
Corporation, not in its
individual capacity but
solely as Master Servicer

By: _____
Name:
Title:

United States Department of Agriculture
Farmer's Home Administration
742 Winkler Drive
Wooster, Ohio 44691
216-345-6791

January 18, 1991

Mr. Charles H. Tieche, City Manager
City of Sebring
135 East Ohio Avenue
Sebring, Ohio 44672

Re: Sebring Water System

Dear Mr. Tieche,

In response to your letter regarding the subject project, we offer the following comments:

1. Farmers Home Administration's (FmHA) loan to the City of Sebring to finance the subject project was sold to General Electric Capital Corporation (GECC) in 1987.

2. FmHA is not providing a loan or payment guarantee to GECC.

3. The City of Sebring's direct obligations to FmHA ceased when the loan was assigned to GECC. These obligations to FmHA, including all payments, reports, etc.) were transferred to GECC along with the loan.

4. The City of Sebring is still obligated to the terms and conditions of the Loan/Bond Resolution(s) entered into at the time they obtained FmHA financing for the subject project.

    a) The City now is simply obligated to GECC instead of FmHA.

    b) The City is still obligated to provide service (water) to all areas that can be engineeringly and economically feasibly

served. However, it is up to the City and their engineers to determine the feasibility.

We trust this response answers your concerns, if you have any additional concerns or questions, please feel free to contact this office at (216) 345-6791.

Sincerely,

Marvin E. Aylsworth
Assistant District Director

Sebring Water Regulation, Section 119 – Each consumer of the Water and/or Sewer Service provided by the Division of Water and Sewer shall be governed by and shall be deemed to have agreed to be so governed by making application for such service(s) all of the Ordinances and Regulations relative to the construction, maintenance and operation of the Water and Sewer Systems; and the same shall extend to all consumers of said service(s) whether located within or without the corporate limits of the Municipality of Sebring, Ohio: and the jurisdiction of the Division of Water and Sewer and the Division of Police for the enforcement there of shall extend into and over any territory outside of the said corporate limits so serviced. (cf. Section 743.13 O.R.C.)